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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-628

LIBERTY NATIONAL LIFE INSURANCE COMPANY, and BROWN-SERVICE FUNERAL HOMES COMPANY, INC.,
Petitioners,

vs.

EDGAR H. BATTLE, d/b/a EDGAR H. BATTLE FUNERAL HOME; OTIS ARMOUR, JR., d/b/a ARMOUR FUNERAL HOME; JOHNSON MEMORIAL FUNERAL DIRECTOR, INC.; TAYLOR HODGE, d/b/a HODGE FUNERAL HOME; HENRY CILLIE, d/b/a CILLIE FUNERAL HOME; EUGENE ERVIN, d/b/a ERVIN FUNERAL HOME; S. T. MADDEN, d/b/a MADDEN FUNERAL HOME; S. C. PERRYMAN, d/b/a S. C. PERRYMAN FUNERAL HOME; R. L. LUMZY, JR., d/b/a LUMZY FUNERAL HOME; J. K. JEFFRIES and FLOYD E. LONG, IND. & d/b/a HAMILTON FUNERAL HOME; WHITFIELD MILES, IND. & d/b/a MILES FUNERAL HOME,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

IRA L. BURLESON
Liberty National Life Building
301 South 20th Street
Birmingham, Alabama 35203

RALPH B. TATE
800 John A. Hand Building
Birmingham, Alabama 35203
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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To the United States Court of Appeals for the Fifth Circuit

I

PRAYER FOR PETITION

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for

the Fifth Circuit which reversed the Order of the District Court dismissing respondents' amended complaint and remanded the cause to the District Court for further proceedings.

II

OPINION BELOW

There was no opinion delivered by the District Court. The opinion of the Court of Appeals for the Fifth Circuit is reported at 493 F.2d 39 (1974), and is set forth in Appendix A herein.

III

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was dated and entered on April 25, 1974. A copy of the judgment is set forth in Appendix A. Timely application for rehearing by petitioners was denied on October 23, 1974. See notice in Appendix A. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 USC 1254(1).

IV

QUESTIONS PRESENTED FOR REVIEW

1. Does the issue and performance of a life insurance policy payable in funeral services and merchandise constitute the "business of insurance" within the meaning of the McCarran-Ferguson Act so as to exempt such activities, when regulated by the state, from the federal antitrust laws?

2. What relief, if any, should be granted in a private treble damage action brought under the federal antitrust laws against a business for conduct which is permissible under the terms of a judicially approved Consent Decree entered 16 years before the private suit was brought?

3. Does concert of action between a parent corporation and its wholly-owned subsidiary operating as one organization in the issue of life insurance by the parent and assistance in performing the policy by the subsidiary constitute actionable combination and conspiracy under the federal antitrust laws (1) where they are under the same management, (2) conduct a single business, (3) do not compete with each other, (4) do not hold themselves out to the public as doing so, and (5) the subsidiary is formed for reasons other than market considerations?

V

STATUTES INVOLVED

Statutes which the case involves are §§ 1 and 2 of the Sherman Act, 15 USC, §§ 1, 2; § 4 of the Clayton Act, 15 USC § 15; and the McCarran-Ferguson Act, 15 USC §§ 1011-1013. These statutes are printed and attached as Appendix B herein.

VI

STATEMENT OF THE CASE

A. Nature of Proceedings and Jurisdiction of District Court

Ten funeral directors (respondents) brought an action against Liberty National Life Insurance Company and its wholly-owned subsidiary, Brown-Service Funeral Homes Company, Inc. (petitioners) claiming that petitioners, in issuing and per-

forming certain life insurance policies violate the federal anti-trust laws. (R. 2-6) The suit claimed violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. (R. 6) Jurisdiction of the District Court was invoked under Sections 4 and 26 of the Clayton Act. 15 USC 15, 26. (R. 6)

B. Statement of Facts as Made by the Pleadings

1. Identity of petitioners

Liberty National is engaged in the business of issuing the usual lines of life insurance, including group, ordinary, and industrial life insurance policies. (R. 8-9) Among the industrial life insurance policies issued by it are policies providing benefits in funeral services and merchandise rather than cash. (R. 9-10) These policies are commonly referred to as burial insurance policies. (R. 9) They contain usual provisions found in cash life insurance policies such as nonforfeiture benefits, accidental death benefits, premium waiver provisions, cash surrender values, and beneficiary designations. However, such policies, instead of providing a benefit in cash upon the death of the insured, provide burial services and burial merchandise for the burial of the deceased insured (R. 9-10).

The merchandise provided consists of casket and burial clothing; the services provided include embalming, use of funeral parlor, a place where the memorial service may be held, assistance in conducting the service, and transportation of the remains of the deceased to the place of interment. (R. 10) These benefits are provided through the facilities of a funeral director authorized by the insurance company. (R. 10-11) If the services of an authorized funeral director are not used, the benefits under the policy are limited to the furnishing of a casket and burial clothing, and, in some instances, to a cash benefit. (R. 11, 61, 65) If the insured dies outside the State of Alabama, the benefits of the policy are payable in cash. (R. 61, 77)

The most numerous of such burial insurance policies issued by Liberty National are those which provide burial benefits having a retail value of $300 and $600. (R. 11) The only substantial difference between these two policies is in the type of casket furnished. (R. 11) In one, a wood casket is provided. (R. 11) Under the other, a metal casket is provided. (R. 11) Both provide essentially the same funeral services. (R. 11)

These burial insurance policies have had wide acceptance in Alabama, the only state in which the company issues such policies. (R. 9) During the years complained of, there were approximately 2.8 million of such burial insurance policies in force in Alabama, and it is alleged that 42% of all persons who died in Alabama during the period complained of owned such burial insurance policies. (R. 12, 17) As a life insurance company, Liberty National sells, issues, performs, various forms of life insurance policies. It does not do business as a funeral director and owns no funeral home business. (R. 168) Instead of providing such burial benefits directly, Liberty National chooses, for federal income tax reasons hereinafter explained, to provide these benefits through a corporate division, its wholly-owned subsidiary, the defendant, Brown-Service. (R. 15)

Brown-Service operates as an incorporated division of Liberty National Life Insurance Company under the same management and carries on no other business than to provide for the performance of burial insurance policies issued by the parent. (R. 14, 27) Brown-Service does not do business as a funeral director and does not own a funeral home business. (R. 168) It performs the burial insurance policy benefits for its parent in two ways. (R. 75-76) First, it furnishes the funeral merchandise such as the casket and the funeral clothing for the deceased insured. (R. 15, 18, 75-76) Then, it purchases from independently owned funeral directors throughout the State of Alabama the services provided by the policy such as embalming and preparation of the body, a place where me-

morial services may be held, assistance in conducting the services, and transportation of the remains of the deceased to the place of interment. (R. 10, 75)

When a burial insurance policy has been performed in such manner, the life insurance company pays its subsidiary, Brown-Service, for such performance—that is, the furnishing of both the funeral merchandise and the funeral services. (R. 79-80) The subsidiary, Brown-Service, provides the funeral merchandise at its own expense, and then pays to the independent funeral directors from whom it has purchased the services an amount of money previously agreed upon between Brown-Service and the funeral director. (R. 33-34, 93-94)

To assure that the funeral services promised will be provided when the burial insurance policy matures by death of the insured, Brown-Service enters into written agreements with funeral directors throughout the state to provide those services when called upon by the family of the deceased insured. (R. 15) Funeral directors who agree to provide such services are called "authorized funeral directors"—that is, they have agreed in advance to provide the services promised by the burial insurance policies at an agreed upon price. (R. 15-16) When an insured under such policy dies in Alabama, an authorized funeral director is called. The funeral director transports the deceased to the funeral home, provides the services called for under the policy, and releases the casket and funeral clothing which Brown-Service has consigned to the premises of the funeral director to be used for such purposes. (R. 9-10) When these are furnished, the life insurance company has fulfilled the policy obligations. (R. 79, 9, 18-19, 33-34) The entire transaction is, thus, the issue of the burial insurance policy and the performance of that policy upon its maturity by providing funeral merchandise and services. (R. 9, 27)

Brown-Service, the wholly-owned corporate subsidiary of Liberty National, engages in no other business than the ac-

tivities hereinabove described and the incidental activities that it must do to perform in the manner outlined. (R. 14) Since it must furnish the casket, it manufactures some in its own plant and purchases others in the open market. (R. 17-18) It is prohibited by the Consent Decree from selling caskets which it manufactures to funeral directors. (R. 169) Since it must furnish the burial clothing, it acquires the same in the open market. (R. 18) To get the caskets and the burial clothing to the premises of the authorized funeral directors, Brown-Service delivers such merchandise on consignment to the premises of the authorized funeral director to be available as needed in the performing of the burial insurance policies. (R. 88, 92)

2. **Funeral directors in Alabama**

There are approximately 224 funeral directors in Alabama. (R. 16, 40) They provide funeral services and funeral merchandise for the preparation for burial and interment of deceased persons. (R. 16) Most of these businesses in Alabama are independently owned, and neither Liberty National nor Brown-Service owns any interest in any such business. (R. 168) A few of the funeral home businesses in Alabama are owned by other insurance companies which also issue burial insurance policies in the state. Any funeral director in Alabama, which meets minimum, uniform, non discriminatory standards of acceptability may, simply upon request, become an authorized funeral director and provide the services for performing of the benefits under burial insurance policies issued by Liberty National. (R. 171) As a consequence, out of some 224 funeral directors in Alabama, 192 (85%) have agreed that they will provide such services. (R. 16, 40) They are the "authorized" funeral directors. (R. 16) Seven of the 32 funeral directors in Alabama who are not "authorized," are owned by competing insurance companies who issue burial insurance policies. (R. 16)

Those funeral directors who are "authorized" may and do perform similar services under burial insurance policies issued by other insurance companies. (R. 15-16, 169-170) Activities of the authorized funeral directors are not in any way circumscribed. (R. 133) They may carry on their regular business of providing funeral services and funeral merchandise to members of the public and of providing funeral services and funeral merchandise in fulfillment of the obligations of burial insurance policies issued by any other insurance company. (R. 169) They may sell additional services and additional or different funeral merchandise for deceased insureds over and above, or different from, that provided under the burial insurance policy. (R. 88, 92-93) If additional services and merchandise over and above those provided by the policies are purchased, the funeral director simply credits upon such "oversales" the stated retail value of the policy, and is paid by Brown-Service the agreed charges for the policy services. (R. 89, 92-93) Of course, the funeral director charges the family of the deceased insured for the additional services and merchandise which the funeral director provides and which is not provided under the policy. (R. 89, 92) However, the burial insurance policy does provide complete funeral services and funeral merchandise for the burial of a deceased where only policy services and merchandise are desired. (R. 60-67, 100-103)

3. **Identity of respondents**

Each of the respondents is a funeral director. (R. 2) Five of them are "authorized" funeral directors, that is, they have agreed to perform the funeral services promised by Liberty National in fulfilling its obligations under burial insurance policies issued by it. (R. 2, 7) The other five respondents are not authorized funeral directors—that is, they have not agreed to provide services on behalf of the insurance company in fulfilling its obligations under burial insurance policies issued by it. (R. 1-2) All

of respondents complain that the petitioners, in issuing and performing burial insurance policies, as hereinabove outlined, combine, and conspire in restraint of trade under Section 1 of the Sherman Act, that they monopolize or attempt to monopolize or combine and conspire to monopolize or attempt to monopolize interstate trade and commerce under the provisions of Section 2 of the Sherman Act, and that their activities constitute price fixing in violation of Section 3 of the Clayton Act. (R. 6, 27-36, 37-45, 45-53).

4. **Alabama regulates the business of insurance**

The business of insurance including burial insurance is pervasively regulated by the State of Alabama. (R. 119-121) Such regulation includes the licensing of companies and agents, the prescription of policy provisions, compliance with standard valuation and nonforfeiture laws requiring adequate reserves to be maintained, assets are required to be valued in such a way as to assure solvency, the companies are subject to periodic examination to assure compliance and their ability to perform the policies they issue, policy forms must be filed with and approved by the Commissioner of Insurance. (R. 120) A more detailed review of such regulation is set out later in this petition.

5. **1954 Consent decree entered in United States of America v. Liberty National Life Insurance Company and others.**

For more than 16 years before the suit was filed, the petitioners operated in accordance with the terms and provisions of a Final Judgment entered by the United States District Court in Birmingham in a suit brought by the Justice Department on behalf of the United States of America against the petitioners, Civil Action No. 7719-S. (R. 153-173) Said Final Judgment detailed a course of subsequent conduct for these petitioners in

the performance of burial insurance policies issued by Liberty National in such a detailed and specific manner that it constituted a charter by which these petitioners have been guided in the performance of such burial insurance policies. (R. 168-173) The Final Judgment proscribed certain conduct on the part of petitioners:

a. Do not acquire, establish, own or operate any funeral home business in Alabama. (R. 168)

b. Do not acquire any interest or make any investment in any other person, firm or corporation selling burial insurance in Alabama. (R. 168)

c. Do not acquire or own, or invest in any other person, firm or corporation manufacturing, distributing, or selling funeral merchandise in Alabama. (R. 168)

d. Do not permit any of your officers, directors or employees to serve as an officer, director or employee of any funeral director in Alabama or of any other person who sells funeral insurance in Alabama. (R. 169)

e. Do not manufacture, distribute or sell funeral merchandise in Alabama except that which is manufactured and distributed for performing burial insurance policies issued by Liberty National. (R. 169)

f. Do not designate or appoint any furneral director in Alabama as agent for the sale of funeral insurance policies or the collection of premiums thereon. (R. 169)

g. Do not hinder, restrict, limit or prevent any funeral director in Alabama from purchasing funeral merchandise from any person or from performing or contracting to perform funeral services for any person, including specifically policyholders of other burial insurance companies. (R. 169)

h. Do not enter into any contract with any funeral director which tends to limit or restrict such funeral director in

furnishing funeral services for any person or company. (R. 169-170)

i. Do not restrict the territory in which any funeral director may do business. (R. 169-170)

j. Do not grant an exclusive right in any territory to any funeral director to perform burial insurance policies for the insurance company. (R. 169-170)

k. Do not hinder, restrict or prevent any funeral director from selling funeral merchandise and funeral services to any person. (R. 170)

l. Do not limit or restrict the number of funeral home businesses which any funeral director may own or operate. (R. 170)

m. Do not hinder, restrict or prevent any funeral director from buying funeral merchandise from any person. (R. 170)

n. Do not require the funeral director to buy funeral merchandise from any designated person, firm or company. (R. 170)

On the other hand, the Final Judgment prescribed that the defendants must take positive action in certain areas:

a. Upon expiration of the initial term specified in any funeral service contract, existing on the date of entry of the Final Judgment, and before renewing such contract, do terminate and cancel any provision of such contract which grants to the funeral director the exclusive right to provide funeral services for policyholders of Liberty National in any area in Alabama or which prevents petitioners from appointing any other funeral director in such area.

b. Do upon the termination, cancellation or expiration of any such funeral service contract publish reasonable,

uniform and nondiscriminatory standards of acceptibility for a contract with funeral directors and do upon request of any funeral director so qualified enter into a funeral service contract with him. (R. 171)

c. Do furnish a copy of the Final Judgment to each contract funeral director in Alabama. (R. 172)

d. Do provide in each funeral service contract that the funeral director may purchase funeral merchandise from and perform services for any person. (1972)

This charter of conduct with its specific proscriptions and prescriptions further provided that representatives of the Justice Department have access to the books and records of the defendants at any reasonable time, and that the defendants submit written reports to the Department of Justice which might from time to time be requested to assure compliance with and enforcement of the Final Judgment. (R. 172-173)

Finally, the court retained jurisdiction of the parties for the purpose of enabling any of them to apply to the court at any time for such orders and directions as might be necessary or appropriate for the carrying out of the provisions of the Final Judgment, for its modification, for its enforcement, and to punish violations. (R. 173)

Pursuant to the terms of the Final Judgment, representatives of the Justice Department have from time to time requested reports from defendants which were provided and have examined books and records of petitioners, and at no time has the Department of Justice informed these petitioners or the District Court of non-compliance with any of the provisions of the Final Judgment. (R. 106-107)

VII

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

A

This Court Should Hold That the Issue and Performance of a Life Insurance Policy Payable in Funeral Services and Merchandise Constitute the "Business of Insurance" Within the Meaning of the McCarran-Ferguson Act So as to Exempt Such Activities From Suit Under the Federal Antitrust Laws.

Petitioners contend that the regulation of the insurance business of petitioners by the State of Alabama operates to supplant the Federal antitrust laws and, therefore, that respondents have failed to state a claim upon which relief can be granted. The District Court so held with respect to Liberty National, but refused to extend the exemption to Brown-Service. The Fifth Circuit thought that there should be a development of factual averments before making a determination that petitioners were "engaged solely in the business of insurance as contemplated by the McCarran Act". *Battle v. Liberty National Life Insurance Company*, 493 F.2d 39, 51 (5 Cir. 1974). It is the position of these petitioners that the pleadings conclusively establish that the activities complained of constitute the "business of insurance" within the meaning of the McCarran Act and that the action of the District Court in dismissing the claim as to Liberty National should be affirmed and extended to Brown-Service.

1. **The McCarran-Ferguson Act.**

Petitioners rely on the provisions of the McCarran-Ferguson Act, 15 USC §§ 1011-1015 (hereinafter in this petition referred to as McCarran Act) to sustain their petition. Section 1012 thereof provides, in pertinent part:

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . .: *Provided, That after June 30, 1948, . . . the Sherman Act, and . . . the Clayton Act, . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.*" (Emphasis added)

Section 1013 of the Act in pertinent part provides:

"(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate or act of boycott, coercion, or intimidation."

To come within the exemption of the McCarran Act, therefore, the activities must constitute "the business of insurance", these activities must be regulated by the state, and there must not be agreements or acts to boycott, coerce or intimidate.

2. **The activities complained of constitute the "business of insurance".**

The most recent delineation by this Court of the meaning of "business of insurance" as those words are used in the McCarran Act is found in *Securities and Exchange Commission v. National Securities*, 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969):

"Insurance companies may do many things which are subject to paramount federal regulation; only when they

> are engaged in the 'business of insurance' does the statute apply. Certainly the fixing of rates is part of this business; that is what South-Eastern Underwriters was all about. The selling and advertising of policies, FTC v. National Casualty Co., 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958), and the licensing of companies and their agents, cf. Robertson v. People of State of California, 328 U.S. 440, 66 S.Ct. 1160, 90 L.Ed. 1366 (1946), are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which Paul v. Virginia held was not 'commerce.' The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance.' "

Subsequent decisions in other courts have further identified and delineated the "business of insurance". Title insurance companies engaged in the issue of title insurance policies and activities related thereto are engaged in the business of insurance. *Commander Leasing Co. v. Transamerica Title Insurance Co.*, 477 F.2d 77 (10 Cir. 1973); *Crawford v. American Title Insurance Co.*, 1974—2 Trade Cases ¶75,320 (D.C., Ala., 1974); *Harrison v. Chicago Title Insurance Co.*, 1974—2 Trade Cases ¶75,321 (D.C., Kan., 1974); *Mitgang v. Western Title Insurance Co.*, 1974—2 Trade Cases ¶75,322 (D.C. Cal., 1974). Mutual life insurance companies issuing life insurance policies and their related activities are engaged in the business of insur-

ance. *Steingart v. Equitable Life Assurance Society*, 366 F. Supp. 790 (S.D.N.Y., 1973). Insurance companies issuing policies of hospital insurance are so engaged. *Travelers Insurance Company v. Blue Cross of Western Pennsylvania*, 361 F.Supp. 774, Aff'd 481 F.2d 80 (3 Cir. 1973). Burial insurance companies issuing burial insurance policies and performing them in a manner similar to the petitioners are engaged in the "business of insurance". *Holly Springs Funeral Home v. United Funeral Service*, 303 F.Supp. 128 (D.C. Miss., 1969). In each of these decisions the activities were held to be exempt from suits for alleged violations of the federal antitrust law.

In *Blue Cross*, the charge was that in issuing and performing hospital policies, Blue Cross violated Sections 1 and 2 of the Sherman Act. Blue Cross issued hospital insurance policies providing hospital services for its insureds and then contracted with various hospitals for those services at charges agreed upon between the insurance company and the hospital. In the relevant market Blue Cross provided hospital insurance for 51% of the population, and during the relevant period accounted for 62% of all patient days which were covered by commercial insurance. The Court held that Blue Cross was engaged in the business of insurance, that the State of Pennsylvania regulated such activities, that there were no sufficient acts of agreements of boycott, coercion or intimidation, and recognized the exemption provided by the McCarran Act from suits under the federal antitrust laws.

The activities of the petitioners are quite similar to the activities complained of in Blue Cross. Liberty National issues a life insurance policy providing funeral services and merchandise. Like Blue Cross, it does not provide those benefits directly, but rather contracts with independent funeral directors throughout the relevant market to provide such funeral services.

A District Court under strikingly similar factual averments and complaints upheld the McCarran exemption. *Holly Springs*

Funeral Home v. United Funeral Services, 303 F.Supp. 128 (D.C. Miss. 1969). There, the plaintiff funeral director brought a class action against the defendant insurance company and its affiliated funeral homes alleging that the activities of such insurance company in issuing burial insurance policies similar to those issued by Liberty National and arranging with its affiliated funeral homes to provide the services under such policies violated the federal antitrust laws.

3. **State regulation**

The State of Alabama pervasively regulated the business of insurance and the activities of the petitioners in issuing and performing life insurance policies payable in funeral services and merchandise. For more than 70 years prior to the filing of this suit the Alabama Code had regulated insurance companies and their activities beginning with the Code of Alabama (1896) Chapter 63. A contract of insurance was defined to be "A contract . . . by which one party . . . promises to pay money, or its equivalent or do some act of value . . . upon the destruction or injury of something in which the other party has an insurable interest." Code of Alabama (1896) § 2576. In 1927 the Alabama Legislature expressly provided for regulation of burial insurance policies. Code of Alabama (1940) Tit. 28 § 259. In 1935 the Alabama Legislature provided for the licensing of insurance companies issuing burial insurance, the valuation of such policies, the reserves to be maintained thereon, and for the examination of such companies. Act No. 114 General Acts of Alabama, Regular Session 1935, codified in Chapter 10 Tit. 28 Alabama Code (1940).

In 1957 the Alabama Legislature enacted the so-called All-Industry Fair Trade Practices Act to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the McCarran Act by defining, or providing

for the determination of, all such practices in Alabama constituting unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined. Code of Alabama (1940) Titl. 28 Section 90(1)-90(14).

The promulgation of Alabama Insurance Department Regulation No. 24 on November 18, 1957 formalized the requirements of many years standing that:

> "Each and every company licensed to do business in the State of Alabama shall submit to the Department of Insurance for filing and having accepted for filing by the Department of Insurance all Life Insurance Policy Forms, . . . prior to delivery or issue of same in this State.
>
> "This shall include, but not limited to Ordinary, Industrial, Group and Annuity Contracts . . ."

In 1971 the Alabama Legislature enacted into law a comprehensive revision of the Alabama Insurance Code, now codified as Title 28A of the Alabama Code. Burial insurance is expressly regulated in Chapter 17. Such insurance is defined to be, "that form of life insurance under which (a) benefits are provided in the form of merchandise and services incident to the burial of the insured. . . " Title 28a § 392(2). The issuance of any policy of life insurance is prohibited until the form has been filed and its provisions approved by the Department of Insurance. Title 28A § 321. The Alabama Insurance Code contains more than 800 sections regulating the business of insurance.

Burial insurance policies must contain "A provision that the insurer has contracted with and appointed an authorized funeral director . . . in this state to furnish the merchandise and services provided by the policy." Title 28A § 398. Such provisions have long been upheld by the Alabama Courts. In *Hunter v. Brown-Service Funeral Co.* (1941), 241 Ala. 25, 200 So. 869, 872, the Alabama Supreme Court said:

> "All that is promised the insured is that the company, . . . will furnish the merchandise and services promised either itself, or through its authorized undertaker . . . ."

Examining a policy of burial insurance substantially similar to those issued by Liberty National, the Fifth Circuit said in *Commissioner v. W. H. Luquire Burial Association*, 102 F.2d 89 (5 Cir. 1939):

> "We can find no real distinction between the policy of insurance issued by the taxpayer here and the policies of ordinary industrial life insurance issued by a number of the major insurance companies . . . The mere fact that the policy is payable not in money, but in something of value equal to money, does not, as a matter of law, exclude it from classification as an insurance contract."

The Alabama courts have recognized funeral insurance policies to be policies of life insurance. *Liberty National Life Insurance Company v. Stringfellow*, 38 Ala. App. 594, 92 So. 2d 924, cert. den. 265 Ala. 561, 92 So. 2d 927 (1956). See also *Booker T. Washington Burial Insurance Company v. Williams*, 27 Ala. App. 393, 173 So. 269; *Jordan Mutual Aid Association v. Asberry*, 26 Ala. App. 105, 154 So. 120.

In addition to the All-Industry Fair Trade Practices Act specifically applicable to insurance companies, the state has long prohibited unlawful combinations, trusts and monopolies. Since 1907 any person, firm or corporation injured or damaged by an unlawful trust, combine or monopoly has a right of action to sue those creating, operating, aiding or abetting such and to recover damages therefor. Tit. 7 § 124. At all times pertinent to the claim of the plaintiffs, the laws of Alabama have declared contracts in restraint of trade to be void (Tit. 9 §§ 22-24), and they have provided penalties. Tit. 57 §§ 106-108. The Alabama antitrust laws are patterned after similar statutes in

other states and are "akin" to the Federal statute known as the Sherman Anti-Trust Act of July 2, 1890. *Georgia Fruit Exchange v. Turnipseed*, 9 Ala. App. 123, 62 So. 542 (1913).

Recently a Federal district court in Alabama has reviewed the insurance laws of the state and found "without question" that those laws have generally regulated title insurance, and concluded that the All Industry Fair Trade Practices Act is fully applicable to the business of insurance so as to exempt such business from the Federal Antitrust Laws. *Crawford v. American Title Insurance Co.*, 1974—2 Trade Cases, ¶ 75,320 (D.C., Ala., 1974).

State regulation of the business of insurance under the McCarran Act exists when state statutes generally proscribe or prescribe or permit certain conduct on the part of the insurance companies. *California League of Independent Insurance Producers v. Aetna Casualty & Surety Co.*, 175 F.Supp. 857 (N.D. Calif. 1959); Accord, *Ohio AFL-CIO v. Insurance Rating Board*, 451 F.2d 1178 (6 Cir. 1971), cert. den. 409 U.S. 917, 93 S.Ct. 215, 34 L.Ed.2d 180 (1972). It is the existence of the regulatory scheme which is decisive and not the efficacy or wisdom of the enactments. *Commander Leasing Co. v. Trans-America Title Insurance Co.*, 477 F.2d 77, 84; *Ohio AFL-CIO v. Insurance Rating Board*, supra; *Allstate Insurance Co. v. Lanier*, 361 F.2d 870 (4 Cir. 1966), cert. den. 385 U.S. 930, 87 S.Ct. 290, 17 L.Ed.2d 212 (1966). To satisfy the requirements of the McCarran-Ferguson Act, state procedure need not be what plaintiff, or the courts, think is the wisest or the most effective type of regulation. *Fleming v. Travelers Indemnity Co.*, 324 F.Supp. 1404, 1406 (D. Mass. 1971).

Recent decisions of several courts have held that if a state has an antitrust law or Fair Trade Practices Act which applies to the business of insurance, these laws are sufficient for the McCarran Act to operate as a bar to a Federal antitrust action

relating to the business of insurance. *Steingart v. Equitable Life Insurance Society*, 366 F. Supp. 790, 794 (S.D.N.Y. 1973); *Crawford v. American Title Insurance Co.*, 1974—2 Trade Cases ¶ 75,320 (D.C. Ala., 1974); *Mitgang v. Western Title Insurance Co.*, 1974—2 Trade Cases ¶ 75,322 (D.C. Cal., 1974).

4. **Boycott, coercion and intimidation**

Recognizing that the activities complained of are the "business of insurance" and that the State regulates these activities, respondents seek to extricate themselves from the bar of the McCarran exemption by lacing their complaint with bald allegations of "boycott, coercion and intimidation." Such bald conclusions, without substantiating factual allegations are insufficient to invoke the exemption. See *Crummer Company v. DuPont*, 223 F.2d 238 (5 Cir., 1955), cert. den. 350 U.S. 848, 76 S.Ct. 85, 100 L.Ed. 755 (1956); *Kinnear-Weed Corp. v. Humble Oil and Refining Co.*, 214 F.2d 819 (5 Cir., 1954), cert. den. 348 U.S. 912, 75 S.Ct. 292, 99 L.Ed. 715 (1955); *Nelson Radio and Supply Co. v. Motorola*, 200 F.2d 911 (5 Cir., 1952), cert. den. 345 U.S. 925, 73 S.Ct. 783, 97 L.Ed. 1356 (5 Cir., 1953).

Recently the Ninth Circuit found, after reviewing the legislative history of the McCarran Act and decisions of other courts, that the "boycott, coercion and intimidation" provisions of the McCarran Act are restricted in their operations and are limited to acts among insurance companies and agents. In *Addrisi v. Equitable Life Assurance Society of U. S.*, ... F.2d ..., 1974—2 Trade Cases ¶ 75,274 (9 Cir., Sept. 30, 1974), it was said:

> "We agree with the rationale expressed in each of those cases in that it is evident from an examination of the

> legislative history behind § 1013(b) that the intent of Congress was to reserve unto the reach of the Sherman Act only a narrow area of restraint of trade activity among those in the business of insurance, namely, antitrust acts among insurance companies and agents for the purpose of boycott or coercion among insurance companies and agents."

Three Federal district courts have also found the "boycott" provisions under the McCarran Act to have a very narrow meaning and have limited its application to the area indicated in *Addrisi*. See *Transnational Insurance Co. v. Rosenlund*, 261 F.Supp. 12, 16-27 (D.C. Ore., 1967); *Meicler v. Aetna Casualty and Surety Co.*, 372 F.Supp. 509 (S.D. Tex., 1974); *Mitgang v. Western Title Insurance Co.*, 1974—2 Trade Cases ¶ 75,322 (D.C. Cal., 1974).

Contrary to *Addrisi* and the decisions therein cited, the Fifth Circuit in these proceedings extended the operation of the exception to respondents to eviscerate the McCarran Act exemption. Even assuming that the Fifth Circuit was right and the Ninth Circuit wrong, construing the complaint most favorable to the respondents, the only substantial allegations of "boycott" and "coercion" do not, in fact, constitute the prohibited conduct. The "boycott" apparently alleged is that petitioners do not pay funeral directors who are not authorized to perform funeral services for the deceased insured of Liberty National when those funeral directors do, in fact, perform funeral services for a deceased insured under some arrangement with the funeral director. It is clear, however, that the complaint alleges no duty, contractual or otherwise, upon the funeral director to perform such services for the petitioners or for the petitioners to pay such funeral directors who do provide the services. Those funeral directors who complain of "boycott" have the key in their own hand. Petitioners are directed by the provisions of the Final Judgment of a Federal

District Court to permit any funeral director in Alabama meeting minimum, uniform standards of acceptability, who agree in advance to furnish such services under the policy, to do so. Those respondents who do not want such contract, do not wish to assume the obligations thereof, and refuse of their own volition to enter into such contract, cannot claim that they have been boycotted by petitioners. The decision to enter into such contract is in their own hands. See *Gorham & Johnson v. Chrysler Corp.*, 308 F.2d 462 (5 Cir., 1962), cert. den. 372 U.S. 912, 83 S.Ct. 725, 9 L.Ed.2d 719 (1963). While usually petitioners would have a right to announce in advance the circumstances under which they would deal with funeral directors (*U. S. v. Colgate Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919)), these petitioners are under the mandate of the consent decree to deal with any funeral director, including any of the respondents, who requests such relationship and assumes the obligations to provide the services. The choice is in the funeral director. Petitioners cannot make a funeral director agree to perform, and a funeral director cannot claim to be boycotted because it refuses to request the right to perform and to assume the obligations of such performance. The choice is that of the funeral director, and if the funeral director refuses such contract, he cannot claim a boycott of him by petitioners.

On the other hand, those respondents who are authorized funeral directors claim "coercion" because, they insist, that they cannot stay in business unless they have a funeral service contract with the petitioners. This alleged "coercion" does no more than to confirm public acceptance of burial insurance in the State of Alabama. Such assertions are similar to the "economic coercion" alleged in Blue Cross. The Court of Appeals there agreed with the District Court that such "economic coercion" was insufficient:

> "The evidence likewise negates the presence of coercion or intimidation on the part of Blue Cross, and Travelers'

theory of 'inherent coercion' predicated upon the proposition that the hospitals had 'no alternatives' because of 'community pressure' does no more than lend credence to Blue Cross' 'thrust upon' defense, which is grounded on the existence of historic accident, superior product, and business acumen as the reasons for its superior competitive position. Community attraction and economic appeal are the antithesis of coercion and intimidation." (*Travelers Insurance Company v. Blue Cross of Western Pennsylvania*, 361 F.Supp. 774, 780).

Those respondents who do not have a funeral service contract claim a boycott. Those respondents who do have such contract claim coercion. One class of respondents complains because they have the contract; the other class complains because they do not have the contract. These complaints simply do not constitute boycott, coercion or intimidation so as to nullify the exemption granted to these petitioners by the McCarran Act.

Respondents do allege that petitioners threatened to build a competing funeral home in an area served by a funeral director who had a funeral service contract but who voluntarily expressed his intention to terminate such relationship. That one funeral director was informed by the petitioners that if such relationship were terminated they would seek another funeral director in the same community to provide the funeral service as an authorized funeral director. Surely this candid advice cannot be so unreasonable as to amount to "intimidation". At the most it was only an offer of competition to the terminating funeral director. It certainly is not intimidation for petitioners to seek the service of a funeral director to perform obligations which petitioners are legally obligated to perform when one who has been performing those services announces his intention no longer to do so.

To conclude, the bald allegations of boycott, coercion and intimidation are insufficient; respondents are not in the class

covered by this exception to the McCarran Act; and the alleged instances of boycott, coercion and intimidation are insufficient as a matter of law to deny the exemption of the McCarran Act to the activities of petitioners.

5. Conclusion

The activities of these petitioners constitute the "business of insurance"; the State of Alabama regulates those activities; the allegations of boycott, coercion and intimidation are insufficient to eviscerate the exemption; and the complaint should be dismissed for failure to state a claim upon which relief can be granted. This was the holding of the District Court with respect to Liberty National, but it should also extend to the activities of the Petitioner, Brown-Service. The "sole function" of Brown-Service, as recognized by the plaintiffs, is "to provide funeral services and merchandise for the defendant, Liberty National Life Insurance Company". (R. 27). This Court held in *Sunkist Growers v. Winckler & Smith Citrus Products*, 370 U.S. 19, 82 S.Ct. 1130, 8 L.Ed.2d 305 (1962) that three operationally separate corporations constituted one association or organization to make effective an exemption from the antitrust laws of 12,000 growers.

This is consistent with other holdings of this Court that such reasonable ancillary activity as is necessary to make governmental regulation of an industry "work" is included within any express antitrust exemption granted to the regulated activities. *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

B

This Court Should Determine What Relief, if Any Should Be Granted in a Private Action Under the Federal Antitrust Laws Against a Business for Conduct Which Is Permissible Under the Terms of a Judicially Approved Consent Decree.

The relief, if any, which may be granted a private party in a suit under the federal antitrust laws against a party for conduct which is permissible under the terms of a judicially approved consent decree is an important question of federal law which has been probed and sounded in extensive litigation and which should be settled by this Court. That there is immunity from the operations of the antitrust laws under other circumstances is well known. State action is protected. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). Federal statute may grant exemption. *Sunkist Growers v. Winckler & Smith Citrus*, etc., 370 U.S. 19, 82 S.Ct. 1130, 8 L.Ed. 2d 305 (1962). Compliance with orders of federal administrative agencies provides immunity. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S. Ct. 647, 34 L.Ed.2d 577 (1973) and *Pan American World Airways v. United States*, 371 U.S. 296, 83 S. Ct. 476, 9 L.Ed.2d 325 (1963). The cases recognize that a judicially approved consent decree may operate as a "kind of umbrella" over the activities of a party to such decree. *International Telephone and Telegraph v. General Telephone and Electronic Corp.*, 351 F. Supp. 1153, 1176 (D.C. Hawaii 1972). It is the extent and limit of that immunity which is involved in this petition.

Petitioners contend that conduct by a party which is permissible under the terms of a judicially approved consent decree affords complete immunity from treble damages and retrospective relief and affords conditional or limited immunity to suits for prospective relief.

Petitioners recognize that a third party may seek relief in a private action, by intervention with consent of the Court, or by

persuading the Department of Justice to seek relief in the court which has retained jurisdiction of the consent decree proceedings. *Sam Fox Publishing Company v. United States*, 366 U.S. 683, 81 S. Ct. 1309, 6 L.Ed. 2d 604 (1961); *United States v. ASCAP* (Applications of Shenandoah Valley Broadcasting, Inc.), 331 F.2d 117 (2 Cir. 1964) cert. den., 377 U.S. 997, 84 S.Ct. 1917, 12 L.Ed. 2d 1048 (1964) and *Columbia Broadcasting System v. ASCAP*, 337 F.Supp. 394 (S.D.N.Y., 1972). Thus petitioners recognize that respondents may seek relief against petitioners for violations of the antitrust laws even though the activities of the petitioners are permissible under the terms of the consent decree. What petitioners do contend, however, is that the respondents could not be granted relief in the instant action.

1. **Respondents were not entitled to damages.**

Respondents sought treble damages. They were not entitled to this relief. General Electric Company operated for many years under a consignment agency system held not to be violative of the antitrust laws. *United States v. General Electric Company*, 272 U.S. 476, 47 S.Ct. 192, 71 L.Ed. 362 (1926) and *United States v. General Electric*, 82 F.Supp. 753 (D.N.J. 1949). However, in a subsequent action the United States sought declaratory judgment and injunctive relief against G. E. claiming that it had altered its system of operation in a manner not contemplated by the court's decree, and that its activities had become unlawful and violative of the federal antitrust laws. The court in *United States v. General Electric Company*, 358 F.Supp. 731 (S.D. N.Y., 1973),* stated:

> "G. E. stresses its good faith adherence through the years since the 1926 case to the pattern of the consignment

* After hearings, final judgment was entered in this proceeding by the District Court in January, 1974 and such final judgment is not reported in the Federal Trade Cases or in the West Reporter System.

agency system held valid there. But this is not a reason for holding the system is still valid. I see no basis for a finding that because G. E. has enjoyed a preferred position under the antitrust laws for many years, its immunity should be made virtually perpetual.

"The relief sought by the Government here is prospective only. I see no reason why G. E. should be subject to private treble-damage actions arising from its understandable reliance on the prior determinations in its favor. The decree here should provide that it have prospective effect only." (Emphasis supplied).

Thus, the court held that a party to a consent decree cannot be liable in treble damages in suits by third party for conduct permissible under the terms of the court's decree, even though that method of operation may be violative of the federal antitrust laws. Similarly, these petitioners contend that they cannot be liable to respondents in treble damages for permissible activities under the consent decree.

2. **The Respondents are not entitled to prospective relief.**

Even prospective relief may not always be granted to plaintiffs who sue a party for activities permitted under consent decrees. Two decisions involving ASCAP and its members point out the extent to which prospective relief may be granted and the conditions under which it may be granted. In *K-91, Inc. v. Gershwin Publishing Company*, 372 F.2d 1 (9 Cir. 1967) cert. den. 389 U.S. 1045, 88 S.Ct. 761, 19 L.Ed.2d 838, radio stations defended a suit for copyright infringement by claiming that plaintiffs violated the federal antitrust laws. ASCAP and its members had operated under the provisions of a consent decree and amendments thereto for more than 20 years. From a judgment in favor of the parties operating under the consent

decree there was an appeal to the Ninth Circuit. Circuit Judge Barnes, who had previously been the Assistant Attorney General of the United States in charge of the Antitrust Division, conceived the litigation in this language:

> "This litigation skirts a very perplexing problem long existing in federal antitrust laws, to wit, the extent to which relief, if any, should be granted against a business for conduct which is permissible under the terms of a judicially approved consent decree. Put another way, the question is whether a consent decree by its terms can immunize against further prosecution for violation of the antitrust laws."

He then decided that, since the parties had operated in compliance with the decree, the antitrust laws were not violated, and that the parties were disinfected and immunized from liability as a potential combination in restraint of trade. So finding, the court affirmed the judgment in favor of the parties operating under the consent decree.

Then, CBS sued ASCAP for alleged antitrust violations. *Columbia Broadcasting System v. ASCAP*, 337 F.Supp. 394 (S.D. N.Y., 1972) In the suit CBS proposed an alternative method of licensing to that which had been provided under the consent decree. The court held that this suggestion by CBS was sufficient to overcome a motion for summary judgment based upon the consent decree, and distinguished the actions of CBS in offering the suggestion from the action of K-91 in not offering any suggestion. The court pointed out that a consent decree establishes a "regulatory system" for the activities of a party conducted under the consent decree, and that this regulatory system grants exemption and immunity from the antitrust laws. However, the immunity and exemption granted under such regulatory system is limited to the "minimum extent necessary" to permit the activities regulated to be carried on without un-

duly encroaching upon the federal antitrust laws. Two rules may then be deduced from the decision of the court in CBS. Third parties who do not come forward with feasible proposals for changing the terms of an existing consent decree, but claim only that the parties operating under the decree violate the antitrust laws, can be afforded no relief because the consent decree immunizes and disinfects the parties under the "rule of reason" test. This was what the court in CBS found to be the holding of the court in K-91. On the other hand, third parties who in their suit come forward with feasible proposals to change the terms of a consent decree may be granted relief if they can prove that the regulatory system set up by the consent decree can be changed in such manner as to lessen the encroachment upon the antitrust laws and still permit the activities governed by the consent decree to be carried on. Such procedure as the court suggested in CBS complies with the holding of this Court in *Sam Fox Publishing Company v. United States*, supra, that relief granted in a private action against a business conducted under a consent decree must, "as a matter of comity at least . . . build on the foundations of the [consent decree]". (366 U.S. 683, 694)

The Fifth Circuit recognized that respondents might seek intervention in the prior suit by the United States which resulted in the consent decree if they believed that petitioners were not conducting themselves in accord with the decree. Petitioners do not contend that this relief suggested by the Fifth Circuit was unavailable to respondents. Neither do petitioners contend that the respondents could not seek prospective relief in the private action which they brought. But what petitioners do contend is that the relief sought by the respondents in this private action could not be granted. Damages could not be awarded. Respondents did not propose suggestions for changing the terms of the consent decree so that the regulatory system established thereunder might encroach to the minimum extent necessary on the federal antitrust laws, as was held in *Columbia Broadcasting*

System v. ASCAP, supra. Rather the respondents are in the same position as the parties who alleged violations in K-91. They proposed no feasible change, and, therefore, were not entitled to any relief.

It is only fair and equitable, as the court by its holding in CBS recognized, that a third party who complains of antitrust violations against parties for conduct permissible under the terms of the consent decree should come forward with positive feasible proposals for amending the consent decree. A party should not be permitted to allege broad violations of the antitrust laws where a consent decree exists with the hope that after an extended trial some unknown and unsuggested change in the regulatory system might result. The party who complains should at least have the responsibility of suggesting at the outset the feasible proposals to obtaining the relief.

Finally, the Fifth Circuit in its opinion in these proceedings below stated (493 F.2d 39, 53):

> "And assuming, without deciding, that damages for past injuries sustained as a result of such a decree are not recoverable, we are not persuaded that plaintiffs would not be entitled to prospective injunctive relief."

Petitioners submit that the Fifth Circuit should have decided that petitioners were not entitled to damages, and, furthermore, that respondents were not entitled to prospective injunctive relief because they did not submit in their complaint a feasible proposal for any such relief. See *Columbia Broadcasting System v. ASCAP*, 337 F.Supp. 394 (S.D.N.Y., 1972) and *K-91, Inc. v. Gershwin Publishing Company*, 372 F.2d 1 (9 Cir. 1967) cert. den. 389 U.S. 1045, 88 S.Ct. 671, 19 L.Ed.2d 838.

Petitioners are authorized by the statutes of Alabama to issue burial insurance policies. In 1954 a federal district court in a suit brought by the United Sates against these petitioners

accommodated the practices of these petitioners in issuing and performing such burial insurance policies to the restrictions of the federal antitrust laws. That consent decree did establish for these petitioners a regulatory system so that they might carry on a business expressly authorized by the laws of Alabama in such manner as not to violate the antitrust laws. Thus, such consent decree established an accommodation between the restrictions of the federal antitrust laws and activities expressly authorized by the State of Alabama. In doing so, the consent decree did what this Court later held in *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed. 389 (1963) to be proper—recognize the immunity and exemption from the antitrust laws to the minimum extent necessary to accommodate to the activities authorized by a federal statute.

It is submitted by petitioners that if respondents had come forward in their complaint and offered a better mode of accommodation, they should have been heard on the question of prospective relief. However, since the respondents asked only for treble damages and offered no feasible proposal to improve the accommodation of the consent decree, respondents are not entitled to any relief in this action and the dismissal by the district court should be affirmed.

C

This Court Should Determine That Concert of Action Between a Parent Corporation and Its Wholly-Owned Corporate Subsidiary Operating as One Organization in the Issue of Life Insurance by the Parent and Assistance in Performing the Policy by the Subsidiary Does Not Constitute Actionable Combination and Conspiracy Under the Federal Antitrust Laws Because (1) They Are Under the Same Management, (2) Conduct a Single Business, (3) Do Not Compete With Each Other, (4) Do Not Hold Themselves Out to the Public as Doing So, and (5) the Subsidiary Is Formed for Reasons Other Than Market Considerations.

This is an important question in the administration of the antitrust laws upon which there appears to be conflict between the Circuits and in which there is thorough-going uncertainty on the part of the business community, antitrust counsel, enforcement agencies, and the courts, leaving no one able to point with confidence to the location of the boundaries between legal and illegal business conduct in this area of the law. See Willis & Pitofsky, "Antitrust Consequences of Using Corporate Subsidiaries", 43 NYU Law Rev. 20, 21 (1968).

For at least 25 years this question has received attention in various treatises and commentaries.* (Id. Footnote)

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* Schwartz, Control of Affiliates, in How to Comply with the Antitrust Laws 240-42 (J. Van Cise & C. Dunn ed. 1954); Adelman, Integration and Antitrust Policy, 63 Harv. L. Rev. 27, 50-51 (1949); Barndt, Two Trees or One?—The Problem of Intra-Enterprise Conspiracy, 23 Mont. L.Rev. 158, 197-99 (1962); Handler, Contract, Combination or Conspiracy, 3 ABA Antitrust Section 38, 46-48 (1953); Handler, Some Misadventures in Antitrust Policy Making, 76 Yale L.J. 92, 119 (1966); Krause, The Multi-Corporate International Business Under Section 1 of the Sherman Act—Intra-Enterprise Conspiracy Revisited, 17 Bus. Law. 912, 925-29 (1962); McQuade, Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act, 41 Va. L. Rev. 183, 208-12 (1955); Rahl, Con-

The basic premise, of course, is that in order to constitute a contract, combination and conspiracy under the antitrust laws, there must be a plurality of actors. See *Poller v. Columbia Broadcasting System Co.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed. 2d 458 (1962); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1950); *United States v. Piowaty & Sons*, 251 F. 375 (D.Mass., 1917); *United States v. MacAndrews & Forbes Co.*, 149 F. 823 (2 Cir., 1906); *Milgram v. Loew's*, 192 F.2d 579 (2 Cir., 1951); *Pittsburg Plate Glass Co. v. United States*, 260 F.2d 397 (4 Cir. 1958); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5 Cir., 1952); *American Tobacco Co. v. United States*, 147 F.2d 93 (6 Cir., 1944); *United States v. Gasoline Retailer's Ass'n, Inc.*, 285 F.2d 688 (7 Cir. 1961). While plurality of actors by consensus as well as the express language of the statute is an essential to antitrust violations under Section 1 of the Sherman Act and under the combination and conspiracy aspects of Section 2 of the Act, it has never been determined that simply because a company uses incorporated subsidiaries in the conduct of its business that that company stands naked before the antitrust laws. It has been observed (Willis & Pitofsky, supra), that:

> "When a company conducts its business through branches, divisions or departments rather than separately incorporated subsidiaries, business arrangements between those branches, divisions, or departments ordinarily go unchallenged under the antitrust laws . . . When a company uses incorporated subsidiaries, however, there is authority for the legal position that those corporate com-

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spiracy and the Anti-Trust Laws, 44 Ill. L.Rev. 743 (1950); Sprunk, Intra-Enterprise Conspiracy, 9 ABA Antitrust Section 20 (1956); Stengel, Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act, 35 Miss. L.J. 5, 27 (1963); Comment, Intra-Enterprise Conspiracy Under the Sherman Act, 63 Yale L.J. 372, 388 (1954). But see Solo, Intra-Enterprise Conspiracy and the Theory of the Firm, 34 J.Bus. 153 (1961); Note, The Sherman Act and Multi-Corporate Single-Traders: Competition Among Affiliates?, 100 U. Pa. L.Rev. 1006, 1022-25 (1952).

ponents are capable of combining or conspiring so as to violate various provisions of the antitrust laws. This concept . . . would render conduct by an enterprise using the multi-corporate form as vulnerable to antitrust attack as if it were the conduct of independent competitors."

The courts, the commentators, and the administrators all seem to concede that merely because one organization does business through corporate divisions or departments it does not bare itself to absolute liability under the antitrust laws, but the areas of such multi-corporate activities have never been defined by this Court.

1. **Decisions of this court.**

This court remarked in *United States v. General Electric Company*, 272 U.S. 476, 47 S.Ct. 192, 71 L.Ed. 362 (1926), that:

> "As the Westinghouse Lamp Company is a corporation all of whose stock is owned by the Westinghouse Electric and Manufacturing Company, and is but its selling agent, we may treat the two as one, . . ."

Four more recent decisions are, however, usually cited and referred to for the proposition that a corporation and its subsidiaries may contract, combine and conspire in a manner prohibited by the antitrust laws.

(a) *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947).

There, an individual, together with others, controlled various stock interests in taxicab operating companies in several major cities and a taxicab manufacturing company. This Court held that simply because the defendants were commonly owned did

not immunize them from prosecution for conspiracy under Section 1. The operating companies in that case competed with each other and held themselves out to the public as doing so. Yellow Taxicabs ostensibly competed with Checker Cabs. Yet these companies made agreements to reduce the number of cabs in operation to serve the public. Both served the public and held themselves out to the public as competing operators.

(b) *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951).

In this case, this Court sustained a treble damage verdict against Seagram and its subsidiary companies who were found to have fixed maximum resale prices on their products and to have enforced such prices. In doing so this Court observed that the doctrine of intraenterprise conspiracy "is especially applicable where, as here [Seagram and Calvert], hold themselves out as competitors."

(c) *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951).

In this case three companies related by substantial stock ownership entered into various antitrust competitive agreements aimed at dividing up the world market between themselves and excluding competition from outsiders. These companies held themselves out to the public as competitors. This court held that the common ownership did not "liberate them" from the "impact of the antitrust laws."

(d) *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968).

Here a group of commonly owned companies were accused of coercing independent distributors through the use of require-

ments and tying contracts and the imposition of territorial and price limitations. This Court flatly rejected the common ownership defense and pointed out that several other bases existed under which these defendant's actions met the multi-party requirements of Section 1. In this case it was alleged that the parent and the subsidiary held themselves out as competitors. See *Tamaron Distributing Corp. v. Weiner*, 418 F.2d 137 (7 Cir. 1969). While this Court held that, ". . . since respondents . . . availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities", it is believed that this Court did not commit itself to the principle that businesses which choose the multi-corporate form thereby give up the conditions of Section 1 of the Sherman Act that the restraint of trade must be accomplished through a plurality of independent actors.

2. **Decisions of other courts.**

Other courts in which this problem has been raised have considered an enterprise may use the multi-corporate form without absolute vulnerability to antitrust attack.

(a) *Joseph E. Seagram & Sons v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (9 Cir. 1969), cert. den. 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755, rehearing den. 397 U.S. 1003, 90 S.Ct. 1113, 25 L.Ed. 2d 415 (1970).

Here the Court distinguished between a parent and its wholly-owned subsidiary which competed and those which did not compete in the sale of liquor. It held that a corporation and its wholly-owned corporate subsidiary, Barton & Barton-Western, which did not compete nor hold itself out to the public as doing so could form no "actionable" conspiracy or combination under Sections 1 and 2 of the Sherman Act.

(b) *Beckman v. Walter Kidde & Co.*, 316 F.Supp. 1321 (S.D. N.Y. 1970), Aff'd 451 F.2d 593 (2 Cir. 1971)

Here a former distributor of products manufactured and distributed by the defendant parent and wholly-owned subsidiary brought an action claiming that the refusal of the defendants to sell the plaintiff any more fire extinguishers amounted to combination and conspiracy in restraint of trade in violation of Section 1 and to monopolize commerce in violation of Section 2. The District Court said (316 F.Supp. 1321, 1325-1326):

> "Recognizing the insufficient foundation of the claimed conspiracy between Kidde and its distributors, Beckman sought to save his cause by the belated allegation that Fyre-Safety and Kidde engaged in an illegal conspiracy, citing Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951), condemning a conspiracy between two subsidiaries of a parent company. Kiefer-Stewart, however, is distinguishable on the crucial ground that the conspiracy in that case was between two competing subsidiary companies, whereas in the instant case Beckman does not contend or offer any evidence to indicate that Fyre-Safety and Kidde were in competition with one another. To the contrary, paragraph Sixth of the complaint alleges that 'WALTER KIDDE & COMPANY, INC., dealt with and used the property and assets of the said defendant, FYRE-SAFETY, INC., and the said WALTER KIDDE & COMPANY, INC. so dominated the affairs of the said co-defendant, FYRE-SAFETY, INC., so as to deprive the said FYRE-SAFETY, INC., of a mind, will or existence of its own.'
>
> "Assuming that there were some discussions between Kidde and its puppet, Fyre-Safety, which resulted in a refusal to sell to Beckman, the court cannot conclude that such discussions constitute a combination within the

meaning of Section 1 of the Sherman Act or that they represent more than internal dialogue leading to a decision on the part of a single business unit to exercise its right to select or disenfranchise a particular distributor. See Alpha Distributing Company of California v. Jack Daniel's Distillery, etc., 207 F.Supp. 136 (N.D. Cal. 1961), affirmed 304 F.2d 451 (9th Cir. 1962). The district court case of Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F.Supp. 915 (D. Haw. 1967), heavily relied on by Beckman in support of a broad application of Kiefer-Stewart, was recently reversed by the Ninth Circuit, stating at the time that 'Surely a manufacturer and its national or regional distributor, whether a subsidiary or an independent, can agree to transfer their business from one wholesaler to another without running afoul of the group boycott per se rule, in the absence of some forbidden anti-competitive or monopolistic objective.' Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 81-82 (9th Cir. 1969), cert. denied 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970). The conclusion that the Kiefer-Stewart principle is inapplicable, is consistent with the virtually unanimous opinion of legal commentators that too broad an application of this principle—in the words of two such commentators—'is inconsistent with the basic approach of antitrust limitations on business conduct. It would unreasonably penalize companies that resort to the incorporated form of doing business, hampering achievement of legitimate business goals unrelated to antitrust considerations, without substantially improving the capacity of the antitrust system to deal with anti-competitive conduct.' Willis & Pitofsky, Anti-Trust Consequences of Using Corporate Subsidiaries, 43 N.Y.U.L.Rev. 20, 24 (1968). See note 47 of this article for a listing of commentators disputing the logic and advisability of a broad application of Kiefer-Stewart."

(c) Other Decisions.

Other courts addressing themselves to similar circumstances have at least held that it is doubtful that mere concept of separate entities under common ownership acting as a single business or enterprise where they do not compete and do not hold themselves out to the public as doing so violate the contract, combination and conspiracy requisite of the antitrust laws. *I. Haas Trucking Corp. v. New York Fruit Auction Corp.*, 364 F.Supp. 868 (S.D.N.Y.), 1973; *Alpha Distributing Company of Cal. v. Jack Daniel Distillery*, 207 F.Supp. 136 (W.D. Cal. 1961); *Allen Ready Mix Concrete Co. v. John A. Denie's Sons Co.*, 1972 Trade Cases ¶ 73,955 (W.D. Tenn. 1972).

3. **Policy of Antitrust Division of Department of Justice.**

Federal enforcement policy rarely has attempted to take advantage of the broad potential inherent in the proposition that simply because a firm does business through corporate divisions that it imperils itself to unusual hazards under the antitrust laws. The "Report of the Attorney General's National Committee to Study the Antitrust Laws" noted in 1955 that the Department of Justice had, "Never brought an action against a parent and its subsidiary corporations . . . charging a conspiracy solely in restraint of trade of the affiliated defendants". Report of U. S. Attorney General's National Committee to Study the Antitrust laws, 34 (1955). In a speech before the Antitrust Section of the American Bar Association Mr. Donald Turner said:

> "[W]e should not press to the limits afforded by past decisions wherever on present evaluation those decisions appear to have gone too far. We should not, for example, attempt to push the intra corporate conspiracy doctrine as far as a free wheeling-interpretation of the Timken case might suggest." 10 Antitrust Bulletin 685, 687 (1965)

On February 22, 1971, Assistant Attorney General Richard W. McLaren in charge of the antitrust division of the Department of Justice wrote to the General Counsel of the Federal Reserve Board a letter setting out the position of the Department of Justice with respect to the intra-enterprise conspiracy doctrine and stated:

> "A corporation may establish subsidiaries for various financial, legal or commercial reasons. Since such multiple corporations have an identical goal—to earn profits for their common cause—they should not be expected to act with respect to each other as if they were independent competitors.
>
> "The Department of Justice has adopted a policy of using the intra-enterprise conspiracy doctrine to challenge, under Section 1 of the Sherman Act, practices engaged in by commonly-controlled firms only where the practice has a coercive or restrictive effect on outsiders. As a result, we have not challenged, and do not expect to challenge, internal arrangements within a corporate group as to prices or markets for the products or services of the corporation within the group; this is a traditional corporate management function. Instead, we have limited our use of the intra-enterprise doctrine to situations in which the commonly-controlled firms have pooled their power in a manner which has adverse competitive effects on independent business entities. See, e.g., United States v. General Tire Co., et al. [1970 Trade Cases ¶ 73,364], D.C.N.D. Ohio, Civil Action No. C-67-155. Such an application of the doctrine is consistent with the facts of the leading Supreme Court decisions."

4. Views of textwriters and commentators.

One writer on this subject has observed:

> "The rule that parent and subsidiary corporations or affiliated corporations may constitute two or more actors for the purpose of Section 1 would, if broadly construed, make it impossible for any corporation to do business in a multi corporate form. Unqualified, the rule would deprive a majority or, even, sole shareholder (the parent) of any voice in the management of the corporation (the subsidiary)." Von Kalinowski 16 Business Organizations, Matthew Bender & Company § 6.01[2], P 6-32.

In McQuade, "Conspiracy, Multicorporate Enterprises and Section 1 of the Sherman Act", 41 Virginia L.Rev. 183, 216 (1955), it is said:

> "Within the present Sherman Act, there is no place for a doctrine of intra-enterprise conspiracy. No logical stopping point exists short of giving a prosecutor carte blanche to attack virtually all multicorporate enterprises. The next logical step would be to admit that coordinate action within a corporation which functions through divisions ought not to be treated differently from that within an enterprise which by historical accident happens to use corporate rather than divisional form. The effect is to read the requirement of conspiracy out of the Act, and to make the presence or absence of restraint the only criterion of violation."

In "Antitrust Consequences of Using Corporation Subsidiaries", 43 NYU L. Rev. 20, this point is put in perspective:

> "When a company conducts its business through branches, divisions, or departments rather than separately incorporated subsidiaries, business arrangements between those branches, divisions, or departments ordinarily go un-

challenged under the antitrust laws. In effect, the branches, divisions, and departments are free to agree among themselves as to prices, territories, classes of customers, levels of production, and the other aspects of planning generally associated with the industrial and marketing process. When a company uses incorporated subsidiaries, however, there is authority for the legal position that those corporate components are capable of combining or conspiring so as to violate various provisions of the antitrust laws. This concept is often referred to as the 'intra-enterprise' or 'bathtub' conspiracy doctrine. and an extreme application of that doctrine would render conduct by an enterprise using the multi-corporate form as vulnerable to antitrust attack as if it were the conduct of independent competitors."

In 16 *Von Kalinowski Business Organizations, Antitrust and Trade Regulations*, at pp. 6-34, it is said:

"A review of the cases indicates that the courts have refused to declare as unlawful concerted action solely between a parent and its subsidiary or subsidiaries where the purpose and effect of the joint action is not unreasonably to restrain the trade of outsiders (i.e., competitors or customers)."

5. **Congressional statement of policy.**

A broad interpretation of the intra-enterprise conspiracy doctrine would render illegal the ordinary conduct of virtually every multi-corporate enterprise, and, as pointed out in the Willis & Pitofsky article, supra, is contrary to the statement of policy contained in ¶ 3 of § 7 of the Clayton Act, originally enacted in 1914 and left unchanged in the 1950 amendment, which provides:

"Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the for-

mation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition." (15 USC 18)

6. **Proposed rule.**

The solution to this problem is suggested by Willis & Pitofsky, "Antitrust Consequences of Using Corporate Subsidiaries", 43 NYU D.Rev. 20, 35:

"Assuming that the broad intra-enterprise conspiracy doctrine cannot be accepted, the question arises as to what more limited interpretation of that doctrine is consistent with the cases and with sound antitrust policy.

With respect to possible problems under the Sherman Act, we suggest that antitrust liability of a multi-corporate enterprise, beyond that which would apply to a single firm, is called for in only two limited situations:

1. Where the enterprise chooses to do business with corporate components and those components publicly adopt a competitive posture.

2. Where the enterprise chooses to do business through corporate components with the specific intent of using those components to achieve an anticompetitive result.

Such an approach is a workable solution and fully consistent with a fair reading of the decided cases."

7. The activities of the defendants do not constitute an actionable contract, combination and conspiracy under the antitrust laws.

As authorized by the laws of Alabama the Petitioner, Liberty National, issues life insurance policies providing benefits in funeral services and merchandise. In issuing the policies it must, of course, perform them. It could itself provide the merchandise and the services to perform the policies. However, it has adopted its present method of operating through a wholly-owned subsidiary for reasons which may be gained from reference to the decision in *Commissioner v. W. H. Luquire Burial Association*, 102 F.2d 89 (5 Cir. 1939). The Commissioner insisted that when an insurance company issued a funeral policy and performed it directly, it should not be taxed as a life insurance company but as some other type of organization. While the court did not agree with the Commissioner, shortly after that decision Congress made it certain by enacting what has become Section 801(f) of the Internal Revenue Code providing:

> "A burial or funeral benefit insurance company engaged *directly* in the manufacture of funeral supplies or the performance of funeral services shall not be taxable under this part [life insurance companies] but shall be taxable under Section 821 or Section 831." (Emphasis supplied)

Since for more than 70 years Liberty National has been in the life insurance business and since only a relatively small portion of its life insurance business involves funeral insurance policies, to retain its tax status as a life insurance company, Liberty National chose that its burial policy should be performed *indirectly* through its wholly owned corporate subsidiary. That is Brown-Service. Brown-Service, for the payments received by it from its parent, provides the funeral merchandise and the funeral services to perform the burial insurance policies. As set forth in the statement of the case, Brown-

Service provides the funeral merchandise directly through consignment to the funeral director and purchases from independent funeral directors the funeral services. At least since the entry of the Consent Final Judgment in 1954 Brown-Service has engaged in no other business. As recognized in the complaint, its sole function is to furnish the services and merchandise for its parent in performing burial insurance policies. It identifies itself with Liberty National. It does not hold itself out to the public as being a separate operating corporation. It does not compete with its parent. It does not sell burial insurance policies. It does not compete with the plaintiff funeral directors. It does not sell funeral services. Its sole function, as recognized in the complaint, is to serve as a corporate division of its parent to assist its parent in performing the obligations of the burial insurance policies issued by the parent.

It is respectfully submitted, therefore, that this concert of action between Liberty National and Brown-Service does not constitute an actionable contract, combination and conspiracy under Section 1 of the Sherman Act nor under those provisions of Section 2 of the Sherman Act for the reasons that the petitioners: (1) are under the same management, (2) conduct a single business, (3) do not compete with each other, (4) do not hold themselves out to the public as doing so, and (5) the subsidiary is formed for reasons other than market considerations.

As stated by this Court in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 82 S.Ct. 1130, 8 L.Ed.2d 305 (1962), "There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities [two in our case] as independent organizations."

The test of actionable combination and conspiracy of a corporation and its wholly-owned subsidiary announced by the Fifth Circuit in its opinion in Battle that corporation must

simply be "operationally two separate organizations", if permitted to stand, would make the multi-corporate form of doing business in the Fifth Circuit extremely hazardous, make meaningless the requisite of combination or conspiracy, and the presence or absence of restraint of trade would become the only criterion of violation of Section 1 and a part of Section 2 of the Sherman Act. It is submitted that this test is so broad as to be meaningless and deserves the review and correction of this Court.

VII

CONCLUSION AND PRAYER FOR WRIT

It is respectfully submitted that the questions set forth in this Petition raise important questions of federal law which have not, but should be, settled by this Court, and that the opinions expressed by the Fifth Circuit conflict with the decisions of other Courts of Appeals. Therefore, petitioners respectfully pray that a Writ of Certiorari be issued by this Court to review the opinion of the Court of Appeals for the Fifth Circuit. In such review, this Court might determine these suggestions to have merit:

1. The issue and performance of a life insurance policy payable in funeral services and merchandise constitute the "business of insurance" and, if regulated by state law, are exempt by the McCarran Act from the federal antitrust laws.

2. Compliance with the provisions of a Consent Decree entered against a party in suits under the federal antitrust laws provides limited and conditional immunity to such party in private treble damage actions. As to retrospective relief, including treble damages, the immunity is complete. As to prospective relief, the immunity of the Consent Decree is minimal extending only to the extent necessary to reconcile the operations complained of with the antitrust laws.

3. Concert of action between a parent corporation and its wholly-owned corporate subsidiary operating as one organization does not constitute actionable combination and conspiracy under the federal antitrust laws if parent and subsidiary (1) are under the same management, (2) conduct a single business, (3) do not compete with each other, (4) do not hold themselves out to the public as doing so, and (5) the subsidiary is formed for reasons other than market considerations.

Respectfully submitted

IRA L. BURLESON
Liberty National Life Building
Post Office Box 2612
Birmingham, Alabama 35202

RALPH B. TATE
800 John A. Hand Building
Birmingham, Alabama 35203
Attorneys for Petitioners

Certificate of Service

Pursuant to Supreme Court Rule 33.1, I hereby certify that I have caused three copies of this Petition for Writ of Certiorari to be deposited in a United States Post Office or Mail Box, with air mail postage prepaid, addressed to Hardin & Stuart, Attorneys at Law, 413 North 21st Street, Birmingham, Alabama 35203, and Pope & Floyd, 502 Fifteenth Street, Phenix City, Alabama 36867, Counsel of Record for Respondents, on this 20th day of November, 1974.

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Attorney for Petitioners